BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY WILLINGHAM	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,006,099
RICHARD HAMAN	)	
Respondent	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the March 25, 2003 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is a claim for a September 6, 2001 accident, which occurred while claimant was traveling in one of respondent's trucks from a carnival in Detroit, Michigan, to another carnival in Albuquerque, New Mexico. The accident occurred on the outskirts of Emporia, Kansas. In the March 25, 2003 preliminary hearing Order, Judge Avery determined that claimant was entitled to receive benefits under the Kansas Workers Compensation Act and ordered the Kansas Workers Compensation Fund (Fund) to pay for claimant's medical and hospital bills.

Respondent and the Fund contend the Judge erred. In his brief to the Board, respondent argues that claimant has failed to prove that he is entitled to receive Kansas workers compensation benefits because (1) claimant did not work for respondent as an employee, (2) equitable estoppel applies as claimant received a settlement from respondent's automobile insurance carrier for the September 2001 accident, (3) claimant was engaged in a prohibited act at the time of the accident as he was permitting an unlicensed coworker to drive despite specific instructions to the contrary, (4) claimant failed to serve respondent with timely written claim for workers compensation benefits, and (5) claimant failed to prove that respondent had the requisite payroll for coverage to exist under the Kansas Workers Compensation Act. Accordingly, respondent and the Fund request the Board to reverse the March 25, 2003 preliminary hearing Order and deny claimant's request for benefits.

The issues before the Board on this appeal are:

1. Was claimant working for respondent at the time of the accident as an employee or as an independent contractor?

2. If claimant was an employee at the time of the accident, did claimant prove that respondent had the requisite payroll for the Kansas Workers Compensation Act to apply to the September 2001 accident?

3. If the Workers Compensation Act applies to this accident, did claimant make timely written claim for benefits?

4. If claimant made timely written claim, did claimant's accident arise out of and in the course of his employment with respondent?

5. If claimant's accident arose out of and in the course of employment with respondent, is claimant prevented under the principles of equitable estoppel from receiving Kansas workers compensation benefits because he previously entered into a settlement with respondent's automobile insurance carrier?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

1. Was claimant working for respondent at the time of the accident as an employee or as an independent contractor?

Respondent owns and operates carnival games and sells fireworks. Claimant began working for respondent in December 2000 selling fireworks. Later, claimant joined respondent's carnival operations and worked setting up and running carnival games. As respondent traveled from carnival to carnival, claimant drove one of respondent's trucks transporting the company's equipment.

The greater weight of the evidence establishes that at the time of the accident the employer/employee relationship existed between claimant and respondent. Claimant was paid 25 percent of the proceeds from the carnival games. But respondent determined the locations of the carnivals that claimant worked, handled the inventory, handled the money, determined claimant's days off, determined claimant's working hours, owned the game equipment and stands that claimant used, owned the trucks and trailers used in transporting the stands, and paid for all the truck repairs and fuel expense incurred moving

the equipment and stands. Most importantly, there is a reasonable inference in the record that respondent retained the right to terminate claimant.

Respondent's owner, Richard M. Haman, testified he believed only individuals that were paid either by the hour or by a set salary would be considered employees and all others would be considered independent contractors.

The Board concludes that respondent exercised sufficient control over claimant and his work activities that he is an employee rather than an independent contractor for purposes of the Kansas Workers Compensation Act.

2. If claimant was an employee at the time of the accident, did claimant prove that respondent had the requisite payroll for the Kansas Workers Compensation Act to apply to this accident?

Respondent conducts business year-round. When the company is not operating games at carnivals, the company sells fireworks. According to claimant, he earned on the average approximately $400 per week working for respondent. In addition to the pay that claimant received from the games, claimant was paid 40 cents per mile to drive respondent's truck. Moreover, claimant testified that respondent employed between 20 and 30 others, most of whom also worked year-round and who also were paid a percentage of the receipts from the games that they operated. Moreover, respondent's owner acknowledged that his company employed approximately 18 people.

The Kansas Workers Compensation Act applies to those employers who have a minimum annual payroll of $20,000 to non-family employees.[1]

When considering the entire record and the reasonable inferences that may be drawn from that evidence, the Board concludes that respondent's annual payroll to non-family members exceeded $20,000. Consequently, the Kansas Workers Compensation Act applies to this claim.

3. If the Workers Compensation Act applies to this accident, did claimant make timely written claim for benefits?

The Kansas Workers Compensation Act requires an injured worker to serve a written claim for benefits upon an employer within 200 days of the accident or within 200

[1] K.S.A. 44-505(a)(2).

days of the last payment of compensation, whichever is later.[2] But the Act also provides that the 200-day period is extended to one year when an employer fails to timely file an accident report.[3]

The parties do not contest the Judge's finding that respondent failed to file the required accident report. Consequently, claimant had one year to serve respondent with a written claim for benefits.

The Act provides that written claim is to be delivered to an employer or the employer's authorized agent. Additionally, the written claim may be mailed to an employer by either registered or certified mail.[4]

According to Mr. Haman's 2001 U.S. Individual Income Tax Return, he maintains an address at 3304 Treaschwig in Humble, Texas, where, according to Mr. Haman, his brother and sister-in-law reside and where Mr. Haman parks a travel trailer.

On August 30, 2002, claimant filed an application for hearing with the Division of Workers Compensation. Also on that date, according to a certified mail receipt introduced into evidence, a written claim for compensation was mailed to Mr. Haman at his Humble, Texas, address. According to the return receipt, on September 5, 2002, written claim was delivered to Mr. Haman's Texas address. The receipt purportedly contains the signature of Angelene Kidd, who Mr. Haman identified as a neighbor. Mr. Haman testified that Ms. Kidd was not authorized to sign for his mail and that he neither saw the written claim form nor learned of this claim until sometime later.

The Board finds that claimant substantially complied with the Act's requirement that he deliver or mail written claim to respondent. Claimant mailed the written claim to the address that Mr. Haman used for other legal purposes and the document was received at that address within one year of the September 6, 2001 accident date. Accordingly, the Board concludes that claimant served timely written claim on respondent.

4. If claimant made timely written claim, did claimant's accident arise out of and in the course of his employment with respondent?

The Board concludes claimant's September 6, 2001 accident arose out of and in the course of employment with respondent. The accident occurred while claimant was

---

[2] K.S.A. 44-520a.

[3] K.S.A. 44-557(c).

[4] K.S.A. 44-520a(a).

delivering equipment to the next carnival that respondent was going to work. The nature of respondent's game concession business made such travel necessary.

At the time of the accident, claimant's coworker, who did not have a driver's license, was driving the truck in which they were riding. Respondent and the Fund argue that claimant was prohibited from permitting his coworker to drive on their trip to New Mexico. Accordingly, respondent and the Fund contend that claimant was injured while performing a prohibited act and, therefore, the September 2001 accident did not arise out of and in the course of his employment with respondent. The Board disagrees.

Kansas law makes a distinction between whether the work being performed at the time of the accident was forbidden or whether the work was being performed in a forbidden manner.

> If an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment.[5]

Here, permitting an unlicensed coworker to drive may have been against respondent's wishes and may have been forbidden. But the act of driving the truck and delivering respondent's equipment to New Mexico was not prohibited or forbidden. Consequently, at most claimant was performing an assigned task in a forbidden manner. The Board concludes claimant's accident arose out of and in the course of his employment with respondent.

5. If claimant's accident arose out of and in the course of employment with respondent, is claimant prevented under the principles of equitable estoppel from receiving Kansas workers compensation benefits because he previously entered into a settlement with respondent's automobile insurance carrier?

Claimant entered into a release of claims agreement with T.H.E. Insurance Company, which is respondent's automobile liability insurance carrier. According to the release introduced at claimant's deposition, claimant received $46,787.27 to release the insurance carrier, Richard Haman and Fidel Hernandez (claimant's coworker) for any and all claims arising from the September 2001 accident.[6]

---

[5] *Hoover v. Ehrsam Company*, 218 Kan. 662, Syl. ¶ 2, 544 P.2d 1366 (1976).

[6] The release actually states September 6, 2002. And according to other documents in the record, the coworker's name was actually Miguel A. Hernandez.

The release form is silent regarding whether claimant was respondent's employee or an independent contractor at the time of the accident. Likewise, the form is silent regarding claimant's waiver of his rights under the Kansas Workers Compensation Act.

The Kansas Workers Compensation Act provides specific methods that may be utilized to settle or finalize a claim for workers compensation benefits. The parties did not follow any of those methods.[7]

Based upon the record compiled to date, the Board finds that respondent and the Fund have failed to establish that equitable estoppel applies to this claim or that claimant's Kansas workers compensation claim has otherwise been settled.

WHEREFORE, the Board affirms the March 25, 2003 Order entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of June 2003.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Derek R. Chappell, Attorney for Fund
Christopher Crowley, Attorney
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] See K.S.A. 44-521, K.S.A. 2002 Supp. 44-523, K.S.A. 44-525, 526, 527, 529, 531, K.A.R. 51-3-1, 51-3-2 and 51-3-16.